

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 15, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2386

Cir. Ct. No. 2007CF609

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID J. MARSHALL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County:
MICHAEL W. GAGE, Judge. *Affirmed.*

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. David Marshall, pro se, appeals an order denying his WIS. STAT. § 974.06 motion for postconviction relief.¹ Marshall argues the circuit court erred by denying: (1) his postconviction discovery request for access to an audio recording of the police interview of witness Matthew Krzoska; and (2) a presentence “motion to reverse judgment of guilty.” Marshall also claims he was denied the effective assistance of postconviction counsel and appears to challenge the sufficiency of the evidence to support his convictions. We reject these arguments and affirm the order.

BACKGROUND

¶2 A jury found Marshall guilty of two counts of second-degree recklessly endangering the safety of two law enforcement officers—Krzoska, an Outagamie County Sheriff’s Deputy, and Appleton Police Officer Chad Melby. Before sentencing, trial counsel filed a “motion to reverse judgment of guilty,” claiming predecessor counsel was ineffective by failing to impeach Krzoska with statements he made during a police interview and at the preliminary hearing. The motion was denied as “procedurally not properly before the court” because sentencing had not yet occurred. The court indicated the motion might be refiled as a postconviction motion. Marshall was ultimately sentenced to consecutive eight-year terms, consisting of four years’ initial confinement and four years’ extended supervision.

¶3 After Marshall’s sentencing, a newly-appointed attorney filed a no-merit notice of appeal. Rather than proceed with the no-merit appeal, Marshall

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

agreed that his attorney should withdraw so that Marshall could pursue a pro se postconviction motion. We consequently dismissed the no-merit appeal without prejudice and extended the time for Marshall to file his postconviction motion. In that motion, Marshall argued his Fourth Amendment rights were violated; the officers engaged in outrageous governmental conduct; trial counsel was ineffective for failing to introduce inconsistent statements; and the prosecutor engaged in misconduct by allowing the officers to testify inconsistently. The motion was denied and, on appeal, we affirmed. *See State v. Marshall*, No. 2011AP106-CR, unpublished slip op. (WI App Jan. 31, 2012). Marshall then filed the underlying WIS. STAT. § 974.06 motion for postconviction relief. The circuit court denied the motion and this appeal follows.

DISCUSSION

¶4 Marshall argues the circuit court erred by denying his postconviction discovery request for access to an audio recording of a police interview with Krzoska, given the day after the incident leading to Marshall's convictions. It appears, however, that Marshall was already given the recording he requests. Krzoska's recorded interview was provided to defense counsel during pretrial discovery and counsel filed a motion in limine regarding the recording. Further, trial counsel's alleged failure to impeach Krzoska with statements made during the subject interview was a basis for both the presentence motion to reverse judgment of guilty and Marshall's pro se postconviction motion. Because Marshall was already provided discovery of the recording prior to trial, he is not entitled to postconviction discovery of the same evidence. *See* WIS. STAT. § 971.23(7) (continuing duty to disclose applies to additional material discovered after compliance with discovery).

¶5 Next, Marshall appears to challenge the circuit court’s denial of the presentence “motion to reverse judgment of guilty.” If Marshall wanted to challenge that denial, however, he should have done so on his first appeal. A motion under WIS. STAT. § 974.06 cannot be used to review issues which were or could have been litigated on direct appeal. *State v. Escalona-Naranjo*, 185 Wis.2d 168, 172, 517 N.W.2d 157 (1994). A defendant is not, however, precluded from raising “an issue of constitutional dimension which for sufficient reason was not asserted or was inadequately raised in his [or her] original, supplemental or amended postconviction motions.” *Id.* at 184. Marshall provides no reason, much less a sufficient reason, for failing to properly raise this challenge on direct appeal. In fact, Marshall states the claim is “obvious from the record.” Ultimately, Marshall has no basis to complain in this appeal about the denial of his presentence “motion to reverse the judgment of guilty.”

¶6 Marshall also asserts his postconviction counsel was ineffective for failing to raise any issue regarding Krzoska’s recorded interview or to re-file the “motion to reverse the judgment of guilty.” However, Marshall’s pro se postconviction motion argued counsel was ineffective for failing to impeach Krzoska with statements he made both during the police interview and at the preliminary hearing. On direct appeal, we concluded that Marshall failed to establish deficient performance or prejudice from his counsel’s failure to impeach the officers’ trial testimony with prior inconsistent statements. “A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.” *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

¶7 If Marshall is alleging additional inaccuracies between Krzoska’s trial testimony and his police interview, he provides no sufficient reason for his

failure to identify all claimed inaccuracies during his direct appeal. To the extent Marshall also appears to challenge the sufficiency of the evidence to support his convictions, he has likewise failed to provide a reason for his failure to raise that argument on direct appeal. Therefore, he is procedurally barred from raising these matters now. *See Escalona-Naranjo*, 185 Wis. 2d at 172, 184.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

